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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 129 ✓

MARJORIE FLEMING LLOYD-SMITH,  
*Petitioner,*

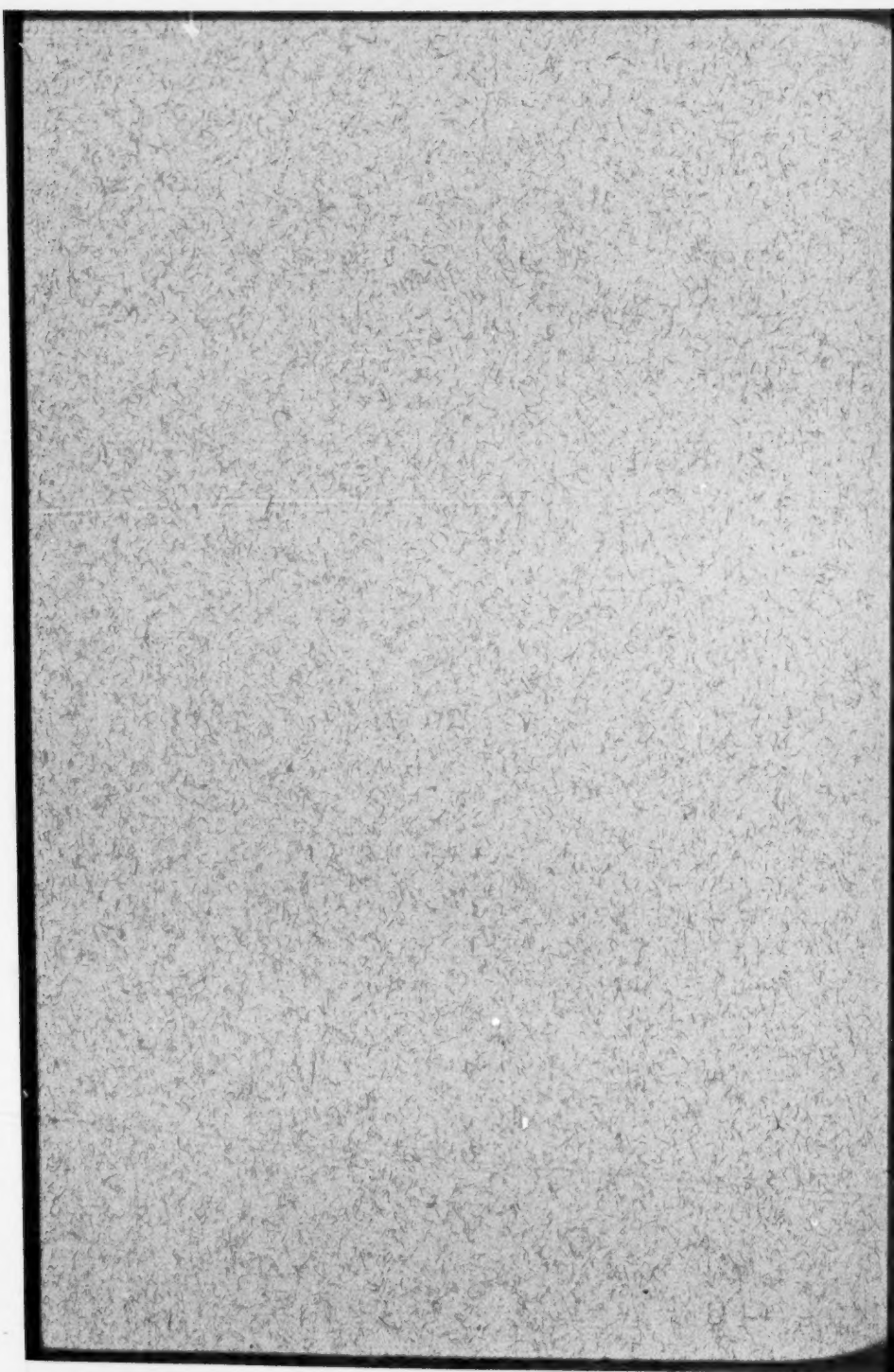
vs.

DONALD BICKNELL, RECEIVER OF THE BANK OF  
SAGINAW, SAGINAW, MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE SECOND CIRCUIT, AND BRIEF IN SUP-  
PORT THEREOF.

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JAMES A. FOWLER, JR.,  
W. R. PERDUE, JR.,  
*Of Counsel.*



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*vs.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

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*To the Honorable the Supreme Court of the United States:*

The petition of Marjorie Fleming Lloyd-Smith respectfully shows:

I. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment entered in that court on March 7, 1940 (R. 41-42). The opinion (R. 37-41) is reported in 109 F. (2d) 527.

II. The question which petitioner seeks to have this Court review is whether a receiver appointed by the Michigan

Banking Commissioner (under a statute which did not vest such receiver with title to the assets) could sue in the Federal court held in New York, or whether it was first necessary that an ancillary receiver be appointed in New York. In view of the practice established by this Court in *Booth v. Clark*, 17 How. 322 (1854) and later decisions, the question becomes this:

Should the new Federal Rules of Civil Procedure be interpreted as changing the established practice of not permitting a foreign receiver (having merely possession and not vested with title to the cause of action) to maintain a suit in a Federal court, and requiring that an ancillary receiver be first appointed?

III. This was an action at law brought in the United States District Court for the Eastern District of New York by the respondent Donald Bicknell, Receiver of the Bank of Saginaw, Saginaw, Michigan, against your petitioner, Marjorie Fleming Lloyd-Smith. The cause of action was based on an alleged guaranty of an issue of corporate bonds (R. 4-6). Although your petitioner asserted several defenses on the merits (which are omitted from the record), the present petition does not involve any of these questions, but relates solely to a single question whether the Michigan receiver can sue in the Federal court in New York or whether there must first be an ancillary appointment.

The relevant allegations of the second amended complaint were:

That the Bank of Saginaw purchased the bonds in April, 1927 and has since continued to be the owner and holder of the same; and that a cause of action upon the guaranty arose in 1932; and

That in 1936, in accordance with Act No. 32 of the Public Acts of the State of Michigan of 1933, the Commissioner of the State Banking Department duly appointed the respondent, Donald Bicknell, as Receiver for the Bank of Saginaw,



a banking corporation of the State of Michigan, a copy of the order of appointment (R. 8-12) being annexed to the complaint; that the said bank had not been dissolved nor its corporate existence ended, but that it was still operating under receivership (R. 3-5).

The amended answer alleged as an affirmative defense that title to the alleged cause of action had not been transferred to or vested in said respondent, the Michigan receiver, and that no steps had been taken for the appointment of an ancillary receiver in New York (R. 19-20).

IV. Upon these undisputed facts, your petitioner moved for judgment on the pleadings, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure (R. 21-22). The District court granted this motion, basing its decision upon the well-settled practice in the Federal courts and citing *Booth v. Clark, supra*, and other decisions of this Court (R. 23-29).

V. The respondent appealed to the Circuit Court of Appeals for the Second Circuit (R. 32). The appeal came on for hearing before the Circuit Court of Appeals, which reversed the judgment of the District court (R. 41-42) and declared in its opinion (R. 37-41) that the practice established by this Court had been changed by Rule 17 (b) of the Federal Rules of Civil Procedure and that, under the new Rule, even a foreign receiver not vested with title to the cause of action can sue in a Federal court held in a State which permits such a receiver to sue.

VI. The reasons why this Court should grant the writ of certiorari are:

The decision of the Circuit Court of Appeals is in conflict with the previous decisions of this Court, from *Booth v. Clark, supra*, decided in 1854, down to *McCandless v. Furlaud*, 293 U. S. 67, decided in 1934.

The decision below is in conflict with new Rule 66 which provides that the practice in receiverships shall continue to be as heretofore followed. Furthermore, it establishes a novel and extraordinary distinction between receivers according to the sources of their appointment, with the result that an *ex parte* appointment by an administrative officer is given greater extra-territorial effect than an appointment by a court.

The decision of said Circuit Court of Appeals abolishes a rule of Federal practice which has been firmly established by decisions of this Court for nearly a century, and also overrides new Rule 66; and it does this by erroneously construing and applying new Rule 17 (b) which does not relate to receiverships but is the general provision as to the capacity of individuals, partnerships and other parties to sue.

This is the first construction of Rule 66 and also the first application of Rule 17 (b) to a receivership. In view of the number of receiverships and actions involving the question of the right of foreign receivers to sue, it is submitted that the question in this case is important and requires an authoritative and elucidating decision from this Court. Otherwise, there will be confusion and uncertainty in the Federal practice with regard to suits by foreign receivers.

WHEREFORE, for reasons stated more fully in the annexed brief, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this cause, being Number 220 on its calendar for the October Term, 1939, to the end that the case may be reviewed and



determined in this Court as provided in Title 28, Section 347 of the Code of Laws of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Second Circuit may be reviewed by this Court and may be reversed, and your petitioner prays for such other and further relief as to this Court shall seem just and proper; and your petitioner will ever pray.

Dated, New York, N. Y., May 31, 1940.

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